87-1591

Supreme Court, U.S.
FILED
MAR 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PAUL SHERWOOD FRASER, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BERNARD H. DEMPSEY, JR., ESQ.
MANUEL SOCIAS, ESQ.
DEMPSEY & GOLDSMITH, P.A.
Suite 500, Day Building
605 East Robinson Street
Post Office Box 1980
Orlando, Florida 32802
(305) 422-5166

Attorneys for Petitioner,
PAUL SHERWOOD FRASER

QUESTIONS PRESENTED

1. When an order compels not just a person, but a person or his attorney, to comply with the provisions of Title 18 U.S.C. §3506(a) may the person immediately appeal such an order?

PARTIES

The parties to the proceedings in the court whose judgment is sought to be reviewed are as follows:

PAUL SHERWOOD FRASER

UNITED STATES DEPARTMENT OF JUSTICE

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINION BELOW	2
JURISDICTION	2
RELEVANT STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	8
I. BY DISMISSING PAUL SHERWOOD FRASER'S APPEAL FOR LACK OF JURISDICTION AND REFUSING TO ISSUE AN EXTRAORDINARY WRIT, THE ELEVENTH CIRCUIT HAS SO FAR SANCTIONED THE DISTRICT COURT'S DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.	8

II. BY TAKING THE POSITION THAT WHEN AN ORDER DIRECTS A PERSON OR HIS REPRESENTATIVE TO COMPLY WITH 18 U.S.C. §3506(a) SUCH AN ORDER IS NOT IMMEDIATELY APPEALABLE, THE ELEVENTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT. 13

CONCLUSION 21

APPENDIX A-1

TABLE OF AUTHORITIES

Cases Cited	Page
Alexander v. United States 201 U.S. 117, 26 S.Ct. 356 (1906)	14, 15
Cobbledick v. United States 309 U.S. 323, 60 S.Ct. 540 (1940)	14, 15
Eastland v. United States Servicemen's Fund 421 U.S. 491, 95 S.Ct. 1813 (1975)	18
Fuentes v. Shevin 407 U.S. 67, 92 S.Ct. 1983 (1972)	9
Hovey v. Elliot 167 U.S. 409, 17 S.Ct. 841 (1897)	8, 9
Pennsylvania v. George F. Ritchie 107 S.Ct. 989 (1987)	19
Perlman v. United States 247 U.S. 7, 38 S.Ct. 417 (1918)	16, 17 18, 21
Ullman v. United States 350 U.S. 422, 76 S.Ct. 497 (1956)	13
United States v. Nixon 418 U.S. 683, 94 S.Ct. 3090 (1974)	18
United States v. Ryan 402 U.S. 530, 91 S.Ct. 1580 (1971)	18
United States v. Morgan 346 U.S. 502, 74 S.Ct. 247 (1954)	10, 11

Other Authorities

18 U.S.C. §3506(a)	3, 4, 5, 6, 13, 17 20,21
28 U.S.C. §1254(1)	2

CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PAUL SHERWOOD FRASER, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

The Petitioner, PAUL SHERWOOD FRASER, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in his case on December 21, 1987.

OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on December 21, 1987. The Eleventh Circuit denied a timely petition for rehearing on January 25, 1988, and this petition for a writ of certiorari was filed within sixty (60) days of that date as required by Rule 20 of the Rules of the Supreme Court of the United States. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

18 U.S.C. §3506(a)

Except as provided in subsection (b) of this section, any national or resident of the United States who submits, or causes to be submitted, a pleading or other document to a court or other authority in a foreign country in opposition to an official request for evidence of an offense shall serve such pleading or other document on the Attorney General at the time such pleading or other document is submitted.

STATEMENT OF THE CASE

On September 4, 1986, the Government filed in the miscellaneous docket a motion for an order pursuant to 18 U.S.C. §3506(a). That motion sought an order compelling PAUL SHERWOOD FRASER to serve upon the Attorney General copies of documents which FRASER had filed or caused to be filed in Switzerland opposing the Government's request for Swiss bank records pursuant to a treaty. The only service of the motion attempted by the Government was to mail a copy from the United States Attorney's offices in Tampa, Florida, to an attorney in Orlando, Florida, who had represented FRASER in preindictment plea discussions. The Government had never previously mentioned to FRASER or the Orlando attorney that it intended to institute proceedings to enforce 18 U.S.C. §3506(a), and the Orlando attorney had not agreed with either

the Government or FRASER to represent FRASER in such proceedings.

On September 5, 1986, the district court entered an order granting the Government's motion before the Orlando attorney had received a copy of the Government's September 4, 1986, motion in the mail. The district court order compelled "Paul Sherwood Fraser or his representative [to] comply with the provisions of Title 18 U.S.C. §3506(a) and serve upon the office of the Attorney General a copy of any and all oppositions filed by or in behalf of Paul Sherwood Fraser in Swiss Courts." The September 5, 1986, Order was never mailed to FRASER or the Orlando attorney, and the Orlando attorney learned that the order had been entered only after making telephone inquiries. The district court's order of September 5, 1986, also was entered in the miscellaneous docket. FRASER's attorney received a copy of the Government's

motion several days after the Court had entered its September 5, 1986, order granting it.

On September 22, 1986, PAUL SHERWOOD FRASER filed a motion to vacate the September 5, 1986, order on due process grounds. On October 6, 1986, the district court entered an order denying FRASER's motion to vacate. On October 16, 1986, PAUL SHERWOOD FRASER filed a notice of appeal from the district court's orders of September 5, 1986, and October 6, 1986. On December 21, 1987, the Eleventh Circuit dismissed FRASER's appeal, holding that jurisdiction was lacking since the district court's order was interlocutory and nonappealable. The Eleventh Circuit made the determination that an order pursuant to 18 U.S.C. §3506(a) is akin to a grant of a motion to compel discovery in a criminal proceeding and that the district court's order was "merely a step in the criminal case."

Consequently, the Eleventh Circuit ruled that PAUL SHERWOOD FRASER's recourse is to disobey the order and challenge the order once the district court finds him in contempt. PAUL SHERWOOD FRASER argued that the district court's order was immediately appealable since said order compelled his attorney to turn over the opposition. The Eleventh Circuit rejected FRASER's argument, stating that the cases FRASER relied on are directed solely to the attorney, whereas in the instant case the district court's order was directed to "Fraser and his representative." Thus, the Eleventh Circuit concluded that the district court's order requires a contempt citation before being appealable.

The Eleventh Circuit denied FRASER's timely petition for rehearing without opinion.

REASONS FOR GRANTING THE WRIT

I. BY DISMISSING PAUL SHERWOOD FRASER'S APPEAL FOR LACK OF JURISDICTION AND REFUSING TO ISSUE AN EXTRAORDINARY WRIT, THE ELEVENTH CIRCUIT HAS SO FAR SANCTIONED THE DISTRICT COURT'S DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

No principle is as entrenched in our jurisprudence than that a court order or judgment issued ex parte without prior notice is void. In Hovey v. Elliot, 167 U.S. 409, 17 S.Ct. 841 (1897) this Court announced this principle in the following language:

> The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have an inherent power to deny all right to defend an action and to render decrees without any hearing whatever is in the very nature of things to convert the court exercising such authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judi-

> cial power necessarily depends.
>
> Id. at 843.

The unwavering right under procedural due process to notice and a hearing as a necessary condition to judicial adjudication was reiterated by this Court in Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983 (1972) where it was stated:

> For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner.
>
> 407 U.S. at 79, 92 S.Ct. at 1994.

Thus, it is clear that an order or judgment entered without prior notice to the defendant, or without the defendant having been given a meaningful opportunity to be

heard, is void for violation of procedural due process requirements. The district court in this case entered its September 5, 1986, decree providing the relief requested by the Government in its September 4, 1986, motion before either FRASER or his counsel had received notice that proceedings had been initiated by the government to obtain said relief. Accordingly, the district court's order of September 5, 1986 is void on due process grounds.

On appeal, FRASER requested the Eleventh Circuit issue a writ vacating the September 5, 1986, decree and remand the case for further proceedings wherein FRASER could assert substantive defenses should the Eleventh Circuit determine that FRASER's appeal was untimely. FRASER cited United States v. Morgan, 346 U.S. 502, 74 S.Ct. 247 (1954), where this Court held that federal courts, in extraordinary circumstances, may

employ "the writ of coram nobis without limitation of time for facts that affect the validity and regularity of [a] judgment." 346 U.S. at 507, 74 S.Ct. at 250. FRASER stressed to the Eleventh Circuit that the issuance of a writ was necessary not only to protect his due process rights, but also to preserve and protect substantive defenses which FRASER was never given the opportunity to raise.

Thus, FRASER requested the Eleventh Circuit, either through its appellate jurisdiction or through issuance of an extraordinary writ, reverse and vacate the district court's orders of September 5, 1986, and October 6, 1986, and remand the case for further proceedings.

However, the Eleventh Circuit refused to exercise its appellate jurisdiction and also refused to issue an extraordinary writ. The Eleventh Circuit refused to consider

FRASER's objections, concluding that FRASER must risk litigating his objections in contempt proceedings. The Eleventh Circuit held that because a contempt citation has yet to issue, FRASER's appeal is premature.

Clearly the district court, through its order of September 5, 1986, has departed from the accepted and usual course of judicial proceedings. By dismissing FRASER's appeal for lack of jurisdiction and refusing to issue an extraordinary writ, the Eleventh Circuit has so far sanctioned such a departure as to call for an exercise of this Court's power of supervision. In exercising its supervisory powers, this Court should quash the district court's order of September 5, 1986, since said order violated PAUL SHERWOOD FRASER's procedural due process rights.

II. BY TAKING THE POSITION THAT WHEN AN ORDER DIRECTS A PERSON OR HIS REPRESENTATIVE TO COMPLY WITH 18 U.S.C. §3506(a) SUCH AN ORDER IS NOT IMMEDIATELY APPEALABLE, THE ELEVENTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

In dismissing PAUL SHERWOOD FRASER's appeal, the Eleventh Circuit held that an order pursuant to §3506(a) is akin to a grant of a motion to compel discovery in a criminal proceeding and that FRASER's recourse is to disobey the district court's order and challenge the order once the district court finds him in contempt. In support, the Eleventh Circuit cited Ullman v. United States, 350 U.S. 422, 425, 76 S.Ct. 497, 499 (1956). In Ullman, the Government filed an application under the Immunity Act of 1954 for an order requiring the petitioner to testify before a grand jury. The district court issued an order which required the petitioner to not only answer questions before the Grand Jury

but also to produce evidence with respect to such matters. The petitioner appealed from the district court's order but his appeal was dismissed by the Court of Appeals for the Second Circuit on the authority of this Court's holding in Cobbledick v. United States, 309 U.S. 323, 60 S.Ct. 540 (1940).

In Cobbledick, the issue before this Court was whether an order denying a motion to quash a subpoena duces tecum directing a witness to appear before a grand jury was an appealable "final decision." This Court held such an order was not an appealable final decision, relying on its previous holding in Alexander v. United States, 201 U.S. 117, 26 S.Ct. 356 (1906), where this Court stated:

> In a certain sense finality can be asserted of the orders under review; so, in a certain sense, finality can be asserted of any order of a court. And such an order may coerce a witness, leaving him no alternative but to obey or be punished. It may have the effect and the same charac-

> teristic of finality as the orders under review, but from such a ruling it will not be contended there is an appeal. Let the court go farther, and punish the witness for contempt of its order, - then arrives a right of review; and this is adequate for his protection without unduly impeding the progress of the case. ... This power to punish being exercised, the matter becomes personal to the witness and a judgment as to him. Prior to that the proceedings are interlocutory in the original suit.
>
> 201 U.S. at 121, 122, 26 S.Ct. at 358. (emphasis added).

However, in Cobbledick this Court noted that, "Due regard for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statutes." 309 U.S. at 329, 60 S.Ct. at 543. By way of illustration this Court in Cobbledick discussed Perlman v. United States, 247 U.S. 7, 38 S.Ct. 417, (1918).

In Perlman, a United States Attorney sought access to exhibits that Perlman had deposited in federal district court in connection with a civil suit. A district judge ordered the court clerk to produce the exhibits to the United States Attorney. Claiming fourth and fifth amendment privileges, Perlman moved to prevent the United States Attorney from receiving the exhibits. The district court denied Perlman's motion. Although the court clerk still retained the exhibits and had not been held in contempt for failing to produce them, this Court permitted Perlman to take an immediate appeal. Reasoning that the court clerk would certainly comply with the production order, this Court ruled that Perlman would be "powerless to avert the mischief of the order" if he were denied an immediate appeal. 247 U.S. at 13, 38 S.Ct. at 419.

The basis for the exception enunciated in Perlman is that absent such a means of appeal, the movant would effectively be denied an avenue for review because he is not able to put himself in contempt to challenge the subpoena but is rather left to the mercy of a third party who has no interest in resisting production.

In the instant case the district court's order compelled PAUL SHERWOOD FRASER or his representative to comply with the provisions of Title 18 U.S.C. §3506(a) and serve upon the office of the Attorney General a copy of any and all oppositions filed by or in behalf of FRASER in Swiss courts. By holding that FRASER is not entitled to an immediate appeal the Eleventh Circuit has decided a federal question in a way which conflicts with applicable decisions of this Court. The Eleventh Circuit has ignored the policy con-

cerns which underlied this Court's decision in Perlman.

This doctrine of immediate appeal is based on the concern that a subpoenaed third party will not risk a contempt citation and will surrender the documents sought thereby precluding effective appellate review at a later stage. As this Court stated in United States v. Ryan, 402 U.S. 530, 532, 91 S.Ct., 1580, 1582 (1971), "To have denied review would have left Perlman 'powerless to avert the mischief of the order' for the custodian could hardly have been expected to risk a citation for contempt in order to secure Perlman an opportunity for judicial review." Furthermore, the Perlman exception and its rationale continues to have vitality as can be seen from this Court's opinions in United States v. Nixon, 418 U.S. 633, 692, 94 S.Ct. 3090, 3099 (1974); Eastland v. United States Servicemen's Fund, 421 U.S. 491, 515, 95

S.Ct. 1813, 1827 (1975): and Pennsylvania v. George F. Ritchie, 107 S.Ct. 989, 1012 (1987).

Here, PAUL SHERWOOD FRASER's attorney is in a position to serve upon the Attorney General a copy of the opposition FRASER filed in Switzerland thereby leaving FRASER "powerless to avert the mischief of the order" and precluding effective appellate review at a later stage. The fact that the order is also addressed to FRASER in no way allows FRASER to control the acts of his attorney who may or may not comply with the district court's order. Furthermore, if the Government does not receive a copy of the Swiss opposition then PAUL SHERWOOD FRASER's attorney risks a contempt citation. The fact that FRASER also risks a contempt citation does not limit his attorney's exposure to that sanction.

The district court's order herein contemplates that PAUL SHERWOOD FRASER and

his attorney can both be held in contempt if Title 18 U.S.C. §3506(a) is not complied with pursuant to the district court's order. However, either PAUL SHERWOOD FRASER or his attorney can comply with the district court's order. Yet PAUL SHERWOOD FRASER has no control over the actions of his attorney. As such, PAUL SHERWOOD FRASER is a powerless third party, the exact type of party the Perlman exception was meant to apply to. Characterizing the district court's order as interlocutory would make the doctrine of finality a means of denying PAUL SHERWOOD FRASER any appellate review of his constitutional claim.

CONCLUSION

The Eleventh Circuit has taken the position that when an order directs a person or his representative to comply with 18 U.S.C. §3506(a) such an order is not immediately appealable. Rather that person must first refuse to comply with the order and be found in contempt before his right to an appeal vests. The Eleventh Circuit's holding ignores this Court's decision in Perlman as well as this Court's subsequent decisions upholding the right to immediate appeal announced in Perlman. As such, the Eleventh Circuit has decided a federal question in a way in conflict with applicable decisions of this Court.

Furthermore, the district court's order of Septemberr 5, 1986, violated PAUL SHERWOOD FRASER's procedural due process rights. By dismissing FRASER's appeal for lack of jurisdiction and refusing to issue an

extraordinary writ, the Eleventh Circuit has so far sanctioned the district court's departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

For the reasons stated herein, this Court should grant a writ of certiorari to review the opinion below.

Respectfully submitted,

BERNARD H. DEMPSEY, JR., ESQ.
MANUEL SOCIAS, ESQ.
DEMPSEY & GOLDSMITH, P.A.
Suite 500, Day Building
605 East Robinson Street
Post Office Box 1980
Orlando, Florida 32802
(305) 422-5166

Attorneys for Petitioner,
PAUL SHERWOOD FRASER

CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PAUL SHERWOOD FRASER, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BERNARD H. DEMPSEY, JR., ESQ.
MANUEL SOCIAS, ESQ.
DEMPSEY & GOLDSMITH, P.A.
Suite 500, Day Building
605 East Robinson Street
Post Office Box 1980
Orlando, Florida 32802
(305) 422-5166

Attorneys for Petitioner,
PAUL SHERWOOD FRASER

TABLE OF CONTENTS

Page

APPENDIX

I. Opinion of the Court of Appeals for the Eleventh Circuit A-1

II. Order of the Court of Appeals for the Eleventh Circuit Denying Petition for Rehearing A-17

APPENDIX

I. Opinion of the Court of Appeals for the Eleventh Circuit

PAUL SHERWOOD FRASER
Petitioner-Appellant,

vs.

UNITED STATES OF AMERICA,
Respondent-Appellee.

No. 86-3710

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Dec. 21, 1987

Grand jury, which was investigating attorney, sought release of Swiss bank records. The United States District Court for the Middle District of Florida, No. 86-65-MISC-T-17, Elizabeth A. Kovachevich, J., ordered attorney to comply with statute requiring him to serve upon Attorney General copy of opposition to disclosure papers he had filed in Switzerland, and attorney appealed. The Court of Appeals, Johnson,

Circuit Judge, held that order was interlocutory, nonappealable order.

Dismissed.

1. CRIMINAL LAW 1023(3)

Statute requiring United States nationals or residents, who submit pleadings in foreign countries in opposition to official request for evidence of offense, to serve such pleading on the Attorney General is akin to grant of motion to compel discovery in criminal proceeding, for purpose of determining whether order compelling compliance with statute is final and appealable. 18 U.S.C.A. §3506(a).

2. CRIMINAL LAW 1023(3)

Preindictment order requiring United States national to serve on Attorney General pleading submitted in foreign country in opposition to official request for evidence of offense was interlocutory, nonappealable

order, in that discovery order was merely step in criminal case: order did not come within collateral order doctrine, in that pleading, which opposed disclosure of foreign bank records, was directly tied to grand jury's investigation of national. 18 U.S.C.A. §3506(a).

Appeal from the United States District Court for the Middle District of Florida.

Before JOHNSON and EDMONDSON, Circuit Judges, and HOFFMAN*, Senior District Judge.

JOHNSON, Circuit Judge:

Paul Sherwood Fraser appeals from an order by the United States District Court for the Middle District of Florida requiring him to comply with 18 U.S.C.A. §3506(a). We

---

*Honorable Walter E. Hoffman, Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

conclude that Fraser has appealed from a nonfinal order. Because we find no reason to permit Fraser's interlocutory appeal, we lack jurisdiction and thus must dismiss this appeal.

I.

Fraser, an attorney, had previously represented Larry Abraham. In connection with Abraham's arrest on April 18, 1986, Fraser's California home was searched. Police found documents linking Fraser to Swiss bank accounts. On April 21, the United States filed an official request with the Swiss government to obtain the Swiss bank records.

Bernard Dempsey, an attorney, was informed on May 3 that Fraser was a target of a grand jury investigation pending in Tampa. On May 26, Fraser, Dempsey, and government

agents met in Tampa to discuss a preindictment plea agreement.

In July, the Swiss government informed the United States that an opposition had been filed against the release of the Swiss bank records. Until the opposition was resolved, the Swiss government would not release the records. The United States learned that Fraser had filed the opposition. Because Fraser had yet to serve the United States with a copy of his opposition as required by 18 U.S.C.A. §3506(a),[1] the government, on September 4, filed a motion in the miscellaneous docket requesting that the

---

[1]Section 3506(a) provides in relevant part:

> [A]ny national or resident of the United States who submits, or causes to be submitted, a pleading or other document to a court or other authority in a foreign country in opposition to an official request for evidence of an offense shall serve such pleading or other document on the Attorney General at the time such pleading or other document is submitted.

district court issue an order directing that "FRASER or his representative" serve the Attorney General with a copy of the opposition within five days. The Government mailed a copy of the motion to Dempsey on September 4. The next day, the district court granted the government's motion and issued the government's requested order, filing the order in the miscellaneous docket.

On September 22, Fraser filed a motion to vacate. The district court denied the motion on October 6. Fraser filed a notice of appeal on October 16.[2]

II.

A colloquy during oral argument best demonstrates that before this Court can

---

[2]This Court, sua sponte, raised and then carried with this case a jurisdictional question concerning the timeliness of Fraser's notice of appeal. We express no opinion regarding this issue because we conclude that Fraser's appeal is premature.

address the merits of Fraser's procedural due process and other claims, this Court must have jurisdiction:

> JUDGE HOFFMAN: There is no way in the world you could say that Fraser and Mr. Dempsey had due process under this arrangement of presenting it on the morning of September the fifth and her [Judge Kovachevich] stamping it granted?
>
> MR. HAMBURG: I wish she didn't--she wouldn't have. I agree. I have no--I have no quarrel with that. It would have been the better practice for Judge Kovachevich to delay this until hearing from the other parties. I agree.[3]
>
> JUDGE JOHNSON: Mr. Hamburg, if I understand the government's position, you're asking that this appeal be dismissed because it's from a nonfinal order--
>
> MR. HAMBURG: That's correct, Judge Johnson.
>
> JUDGE JOHNSON: And that the case be remanded to the district court for further proceedings.
>
> MR. HAMBURG: That's correct.

---

[3]Later in the course of his argument Hamburg retracted his apparent concession that Fraser's procedural due process rights had been violated.

We conclude that Fraser must risk litigating his objections in contempt proceedings. Because a contempt citation has yet to issue, Fraser's appeal is premature. Consequently, we lack jurisdiction to determine whether Fraser's procedural due process rights were violated when the district court issued the order one day after the government had requested it and before Fraser had an opportunity to oppose it. Nor may we consider the merits of Fraser's other objections.

A. Criminal Case or Civil Case?

Initially, we must determine whether this case should be characterized as a civil or criminal proceeding. Fraser argues that Section 3506(a) does not establish an offense and carries no criminal penalty, but merely creates a civil duty to serve the Attorney

General with copies of certain documents filed in foreign countries. The government argues that Section 3506(a)'s language and legislative history demonstrate that the order is part of a criminal case.

[1] This is a question of first impression in the federal courts. We hold that the statute's language, position in the United States Code, and legislative history indicate that an order pursuant to Section 3506(a) is akin to a grant of a motion to compel discovery in a criminal proceeding.

Congress passed Section 3506(a) as part of the Comprehensive Crime Control Act of 1984, Pub.L. No. 98-473, tit. II, §1217(a), 98 Stat. 1837, 2165-66. Section 3506(a) was designed to assist government investigation and prosecution of criminal offenses when the government has requested foreign records:

> It is not unknown ... for a defendant to seek to block compliance with the request for the records by initiating, without notice to the United States, an action in the courts or another official forum of the other country. In such a circumstance, the United States prosecutor may be unable to respond to the foreign action in a timely manner, forced to delay seeking an indictment, or compelled to seek a continuance in a pending criminal case.

H.R.Rep. No. 907, 98th Cong., 2d Sess. 2, reprinted in 1984 U.S.Code Cong. & Admin. News 3182, 3578-79.

> New section 3506 requires that United States prosecutors be notified of certain steps taken in another country to oppose an official request made by the United States for evidence located in that country. Subsection (a) requires such notification when the steps are taken in response to an official request made during the investigation of an offense ...

Id. at 6, reprinted in 1984 U.S.C.C.A.N. at

3582.[4]

In addition, Section 3506(a) was placed in title 18 (Crimes and Criminal Procedure), part II (Criminal Procedure), chapter 223 (Witnesses and Evidence) of the United States Code. From this placement and Section 3506(a)'s legislative history, we discern that Congress intended Section 3506(a) to function as an evidence-gathering, discovery device in a criminal case. As such, a motion for an order compelling compliance with Section 3506(a) is akin to a motion for an order compelling compliance with a discovery request. See Fed.R.Crim.P. 16(d)(2).

---

[4]In addition, Congress provided that an official request for evidence located in a foreign country tolls the statute of limitations for the offense under grand jury investigation. See 18 U.S.C.A. §3292. Congress also sought to eliminate delays preventing prosecution from starting within the time specified by the Speedy Trial Act. See 18 U.S.C.A. §3161(h)(9).

The present posture of this case (i.e., preindictment) does not require that we characterize the district court's order as part of a civil proceeding. Indeed, this Court has recognized that "[a] pending criminal investigation, even in the absence of a formal charge, may be sufficient to show that the motion is tied to an existing criminal prosecution." In re Grand Jury Proceedings (Berry), 730 F.2d 716 (11th Cir. 1984) (per curiam). Here, Fraser is the subject of a grand jury investigation and Congress specifically passed Section 3506(a) so prosecutors need not delay seeking indictments.

B. Finality

For this Court to have jurisdiction of Fraser's appeal, the decision being challenged must constitute a "final judgment" within the meaning of 28 U.S.C.A. §1291,

which provides that courts of appeals "shall have jurisdiction of appeals from all final decisions of the district courts."

[2] We hold that Fraser seeks review of an interlocutory nonappealable order. "'Final judgment in a criminal case means sentence. The sentence is the judgment.'" Parr v. United States, 351 U.S. 513, 518, 76 S.Ct. 912, 916, 100 L.Ed. 1377 (1956) (quoting Berman v. United States, 302 U.S. 211, 212, 58 S.Ct. 164, 166, 82 L.Ed. 204 (1937). Two analogies support our conclusion. First, orders compelling discovery pursuant to Fed.R.Crim.P. 16 are interlocutory and not appealable; a defendant may seek review of adverse orders after conviction. 2 C. Wright, Federal Practice and Procedure §261, at 126 (2d ed. 1982). Second, orders denying return of seized property are nonappealable when the property is tied to a pending

criminal investigation. Grand Jury Proceedings, 730 F.2d at 717 (citations omitted), provides a guiding analogy for the present case:

> [U]nless the motion is in no way tied to an ongoing criminal prosecution, an order denying the return of property is considered to be merely a step in the criminal case preliminary to the trial and is an interlocutory non-appealable order. The mere circumstance of a preindictment, rather than postindictment, motion does not make the order denying the motion final and appealable. A pending criminal investigation, even in the absence of a formal charge, may be sufficient to show that the motion is tied to an existing criminal prosecution.[5]

Likewise, the district court's order at issue here is "merely a step in the criminal case." The legislative history also indicates that Congress did not intend for interlocutory appeal, because Section 3506(a)

---

[5]See In re Grand Jury Proceedings, 831 F.2d 222, 224 (11th Cir. 1987); see also, Cobbledick v. United States, 309 U.S. 323 (1940) (order denying motion to quash grand jury's subpoena duces tecum is not a "final decision").

was designed to facilitate the return of indictments. Consequently, Fraser's recourse is to disobey the order and challenge the order once the district court finds him in contempt. See Ullmann v. United States, 350 U.S. 422, 425, 76 U.S. 497, 499, 100 L.Ed. 511 (1956).

We also reject Fraser's argument that the district court's order falls within the narrow confines of the collateral order doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). "The Cohen doctrine allows appeals to be taken from orders that (1) finally determine claims entirely collateral to and separable from the substance of other claims in the action, (2) require review because they present significant, unsettled questions, and (3) cannot be reviewed effectively once the case

is finally decided." Huie v. Bowen, 788 F.2d 698, 701 (11th Cir. 1986). The order at issue here does not resolve an issue completely separate from the merits because the opposition and bank records are directly tied to the grand jury's investigation of Fraser. See Parr, 351 U.S. at 519, 76 S.Ct. at 916. In addition, effective appellate review is available once the criminal prosecution, if any, has concluded.[6] See id. at 519-20, 76 S.Ct. at 916.

Accordingly, APPEAL DISMISSED.

---

[6]Fraser's argument is unavailing that the order is immediately appealable because the order compels his attorney to turn over the opposition. See e.g., In re Grand Jury Proceedings (Twist), 689 F.2d 1351, 1352 n. 1 (11th Cir. 1982) (per curiam). Cases such as Twist avoid the contempt requirement because they are directed solely to the attorney. Here, the order is directed to "Fraser and his representative" and consequently requires a contempt citation before being appealable.

II. Order of the Court of Appeals for the Eleventh Circuit Denying Petition for Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-3710

PAUL SHERWOOD FRASER,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION FOR REHEARING
(January 25, 1988)

BEFORE: JOHNSON and EDMONSON, Circuit Judges, and HOFFMAN*, Senior District Judge.

PER CURIAM: The petition for rehearing filed by the appellant is denied.

ENTERED FOR THE COURT:

Frank M. Johnson, Jr.
United States Circuit Judge

*Hon. Walter E. Hoffman, Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

Supreme Court, U.S.
FILED
MAY 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1591

In the Supreme Court of the United States

OCTOBER TERM, 1987

PAUL SHERWOOD FRASER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
MERVYN HAMBURG
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether petitioner may take an interlocutory appeal from an order directing him or his representative to comply with 18 U.S.C. (Supp. IV) 3506(a), which requires nationals and residents of the United States to serve on the Attorney General any pleadings or documents filed in a foreign country in opposition to the United States government's request for evidence.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Cobbledick v. *United States*, 309 U.S. 323 (1940) 5
Grand Jury Proceedings, In re, 689 F.2d 1351 (11th Cir. 1982) 4
Grand Jury Proceedings, Vargas, In re, 723 F.2d 1461 (10th Cir. 1983) 6
Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, In re, 731 F.2d 1032 (2d Cir. 1984) 6
Grand Jury Subpoena (85-W-71-5), In re, 784 F.2d 857 (8th Cir. 1986), cert. dismissed, 479 U.S. 1048 (1987) .. 6
Oberkoetter, In re, 612 F.2d 15 (1st Cir. 1980) 6
Parr v. *United States*, 351 U.S. 513 (1956) 6
Perlman v. *United States*, 247 U.S. 7 (1918) 4, 5, 6
Sealed Case, In re, 655 F.2d 1298 (D.C. Cir. 1981) 6
United States v. *Hasting*, 461 U.S. 499 (1983) 7
United States v. *Ryan*, 402 U.S. 530 (1971) 5, 6

Constitution and statutes:

U.S. Const. Amend. V 6
18 U.S.C. (Supp. IV) 3506 4
18 U.S.C. (Supp. IV) 3506(a) 2, 3, 4, 5, 6, 7
18 U.S.C. (Supp. IV) 3506(c) 3

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1591

PAUL SHERWOOD FRASER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 834 F.2d 911.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1987. A petition for rehearing was denied on January 25, 1988 (Pet. App. 17). The petition for a writ of certiorari was filed on March 24, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On April 18, 1986, a federal grand jury sitting in the Middle District of Florida returned an indictment against

Larry Abraham (R.E. 3).[1] Two days later, federal authorities executed a search warrant at Abraham's residence in Montecito, California. Documents found at the residence showed that petitioner, an attorney who had represented Abraham, controlled four numbered bank accounts in Geneva, Switzerland (*id.* at 4). On April 21, the United States filed an official request with the Swiss government to obtain the records of petitioner's Swiss bank accounts (*id.* at 4-5; Pet. App. 4).

On May 3, the government told petitioner's attorney, Bernard Dempsey, that petitioner was the target of a grand jury investigation pending in Tampa, Florida. As a result, petitioner, Dempsey, and government agents met on May 26 to discuss a possible pre-indictment plea agreement. R.E. 4; Pet. App. 4-5.

In July, Swiss authorities notified the United States that a pleading had been filed in Switzerland opposing the release of petitioner's Swiss bank records. The Swiss authorities further advised the government that they would not release the bank records until that litigation was resolved. R.E. 5; Pet. App. 5.

The government later learned that petitioner had filed the opposition to the release of the Swiss bank records. Petitioner, however, had not served a copy of the opposition on the Attorney General, as required by 18 U.S.C. (Supp. IV) 3506(a) (R.E. 5; Pet. App. 5).[2] Accordingly, on September 4, 1986, the government filed in the United

---

[1] "R.E." refers to the Record Excerpts filed with petitioner's brief in the court of appeals.

[2] Section 3506(a) (18 U.S.C. (Supp. IV)) provides in relevant part:

> [A]ny national or resident of the United States who submits, or causes to be submitted, a pleading or other document to a court or other authority in a foreign country in opposition to an official request for evidence of an offense shall serve such pleading or

States District Court for the Middle District of Florida a motion to require petitioner or his representative to comply with 18 U.S.C. (Supp. IV) 3506(a) and serve a copy of the opposition on the government.[3] R.E. 2, 3-7; Pet. App. 5-6.

2. On September 5, the district court granted the motion and ordered petitioner or his representative to serve the Attorney General with a copy of the opposition that had been filed in Switzerland (R.E. 10; Pet. App. 6). On September 22, petitioner filed a motion to vacate that order, arguing among other things that the district court lacked jurisdiction and venue and that the government had not properly served petitioner with its motion (R.E. 11-18; Pet. App. 6). The district court denied that motion on October 6. On October 16, petitioner filed a notice of appeal (Pet. App. 6).

3. The court of appeals dismissed petitioner's appeal, holding that the district court's order directing him to provide the government with a copy of the foreign pleading was "an interlocutory nonappealable order" (Pet. App. 13).[4] After reviewing the language and legislative history

---

other document on the Attorney General at the time such pleading or other document is submitted.

Section 3506(c) (18 U.S.C. (Supp. IV)) defines "official request" to include

> a letter rogatory, a request under a treaty or convention, or any other request for evidence made by a court of the United States or an authority of the United States having criminal law enforcement responsibility, to a court or other authority of a foreign country.

[3] The government served petitioner with a copy of its motion by mailing it to petitioner's attorney, Bernard Dempsey, at his office in Orlando, Florida (R.E. 8; Pet. App. 6).

[4] The court declined to address petitioner's arguments on the merits or the government's contention that petitioner's appeal was untimely because of his failure to file a notice of appeal within ten days after the entry of the September 5 order.

of Section 3506, the court of appeals concluded that the district court's order should be characterized as part of a criminal proceeding and, as such, was "akin to * * * an order compelling compliance with a discovery request" (Pet. App. 11). Accordingly, the court of appeals held, the district court's order was not appealable until petitioner disobeyed the order and challenged its validity during contempt proceedings.[5]

ARGUMENT

1. Petitioner contends (Pet. 13-20) that the district court's order is immediately appealable under the exception to the final order rule that this Court recognized in *Perlman* v. *United States*, 247 U.S. 7 (1918). Petitioner argues that requiring him to face contempt in order to perfect an appeal precludes meaningful appellate review, because both petitioner and his attorney have been directed to comply with the court's order, and because petitioner "has no control over the actions of his attorney" (Pet. 20). Petitioner thus asserts that *Perlman* authorizes his immediate appeal because he "is a powerless third party, the exact type of party the *Perlman* exception was meant to apply to" (*ibid.*).

---

[5] The court rejected petitioner's claim that the order was immediately appealable because it also required petitioner's attorney to comply with Section 3506(a). The court distinguished cases such as *In re Grand Jury Proceedings*, 689 F.2d 1351 (11th Cir. 1982), which have permitted immediate appeals of orders directing attorneys to disclose allegedly privileged client information, on the ground that such cases "avoid the contempt requirement because [the orders] are directed *solely* to the attorney" (Pet. App. 16 n.6 (emphasis in original)). This case, the court pointed out, involved an order directed to petitioner and his representative, and thus "require[d] a contempt citation before being appealable" (*ibid.*).

Contrary to petitioner's suggestion, *Perlman* does not control this case. The district court's order, which was directed to petitioner "or his representative" (R.E. 10), places the responsibility to comply with the order solely in petitioner's hands, not in those of his unnamed representative. Because petitioner has complete control over the decision to comply with the court's order, he can obtain appellate review of the order through the ordinary course of challenging the order in a contempt proceeding.

In *Perlman* v. *United States*, supra, the district court ordered a court clerk to produce materials that were in the clerk's custody because they had been offered as exhibits in a lawsuit. The exhibits belonged to Perlman, who claimed they were privileged. This Court held that Perlman could take an immediate appeal from the order to produce the exhibits, because the clerk, as the third-party custodian, could not be expected to risk a contempt citation in order to secure Perlman's opportunity for appellate review. 247 U.S. at 12-13. Under these circumstances, Perlman would be "powerless to avert the mischief of the order" (*id.* at 13) unless he were granted the right of immediate appeal. See *United States* v. *Ryan*, 402 U.S. 530, 532-533 (1971); *Cobbledick* v. *United States*, 309 U.S. 323, 325-329 (1940).

Unlike the situation in *Perlman*, the order petitioner challenges is not directed to a third party over whom he exercises no control. On the contrary, the order directs petitioner, either himself "or [through] his representative," to comply with Section 3506(a). The fact that the government followed normal procedures and served petitioner's counsel with its motion does not change the meaning of the court's order. Petitioner himself has the ability to choose whether and how to comply with the district court's

order. In other words, petitioner is not entitled to immediate appellate review because he

> is free to refuse compliance and * * * in such event he may obtain full review of his claims before undertaking any compliance with the [order].

United States v. *Ryan*, 402 U.S. at 533. The court of appeals thus correctly dismissed petitioner's appeal.[6]

2. Petitioner further contends (Pet. 8-12) that the court of appeals should have issued "an extraordinary writ" in the absence of an immediate appeal because the district court's order clearly "violated [his] procedural due process rights" (*id.* at 12). Petitioner's argument is meritless. In *Parr* v. *United States*, 351 U.S. 513, 520-521 (1956), this Court made clear that "[t]he extraordinary writs do not reach to such cases; they may not be used to thwart the congressional policy against piecemeal appeals." As shown above, petitioner has an available and

---

[6] For the same reasons, this case does not present this Court with an occasion to resolve the conflict among the courts of appeals concerning whether an individual, claiming a privilege, may invoke *Perlman* to appeal an order denying a motion to quash a grand jury subpoena issued to a third party. Compare *In re Grand Jury Subpoena (85-W-71-5)*, 784 F.2d 857, 859-860 (8th Cir. 1986) (appealable order), cert. dismissed, 479 U.S. 1048 (1987) and *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1036 n.3 (2d Cir. 1984) (same) with *In re Grand Jury Proceedings, Vargas*, 723 F.2d 1461, 1465-1466 (10th Cir. 1983) (nonappealable order) and *In re Sealed Case*, 655 F.2d 1298, 1301-1302 (D.C. Cir. 1981) (same) and *In re Oberkoetter*, 612 F.2d 15, 16-19 (1st Cir. 1980) (same).

Petitioner does not even raise a colorable claim of privilege as a basis for challenging the district court's order. Section 3506(a) establishes a mandatory duty to serve the Attorney General with the appropriate pleadings and documents. Moreover, petitioner may hardly claim any attorney-client or Fifth Amendment privilege in documents filed as a matter of public record in a foreign jurisdiction.

meaningful opportunity for judicial review of his claims should he persist in refusing to obey the district court's order.[7]

In any event, petitioner does not suggest how the use of different procedures in the district court could have produced a different result. Section 3506(a) imposes an absolute requirement that foreign pleadings of the sort filed on petitioner's behalf in Switzerland be served on the government. Although petitioner raised several procedural objections to the government's motion requesting a copy of that pleading, he raised nothing to suggest that he might ultimately be entitled to avoid the obligation imposed by Section 3506(a). For that reason as well, this is not an appropriate case in which to grant some form of extraordinary relief.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
MERVYN HAMBURG
Attorney

MAY 1988

---

[7] Petitioner also suggests (Pet. 12) that this Court should exercise its "supervisory powers" and quash the district court's order. This novel suggestion ignores the fact that supervisory power can be invoked only in aid of jurisdiction, not to create jurisdiction in the first instance. Cf. *United States* v. *Hasting*, 461 U.S. 499, 505 (1983).

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60436